IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.185 OF 2004

Ramesh Singh @ Chauhan ...Applicant

Versus

The State of Maharashtra ...Respondent

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Mr.S.V.Kotwal i/b Mr.S.S.Bhandary for Applicant.

Mr.V.B.Konde-Deshmukh, A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

MARCH 23, 2005.

P.C.

1. Heard Counsel for the parties.

2. This Revision Application takes exception to the order passed by the Sessions Judge under N.D.P.S. Act for Greater Bombay dated 3rd May 2003 rejecting the application for discharge preferred by the Applicant being Misc.Application No.42 of 2003 in N.D.P.S. Special Case No.94 of 2003.

3. The background in which the Applicant moved the Trial Court for discharge is that only three circumstances emerged from the record to indicate his complicity in the commission of the offence.

4. The first is that the name of the Applicant was disclosed in the information received under Section 42 of the N.D.P.S. Act, prior to raid. The second is the statement of co-accused who has said that the charas in question has been received by him from the Applicant. The third circumstance is that the co-accused had led the investigating team towards the house of the Applicant. However, it is fairly accepted by the learned A.P.P. that there is nothing on record to show that during the raid conducted in the house of the Applicant, any incriminating material has been recovered.

5. In the backdrop of the above circumstances, it is argued that the statement of the co-accused cannot be taken into account in view

of the bar under Section 25 read with Section 26 of The Indian Evidence Act, 1872 ('the Act'), as the same has not been recorded before the Magistrate or before the authorised person under Section 67 of the N.D.P.S. Act. It is then contended that in any case, the said statement being inadmissible in evidence, will be of no avail, and cannot be looked into on account of bar under Section 30 of the Act.

6. It is argued that the third circumstance of accused leading the investigating team to the house of the Applicant, is of no avail because no incriminating material has been found during the raid.

7. Insofar as the circumstance that the name of the Applicant was disclosed in the information received under Section 42 of the N.D.P.S. Act prior to raid is concerned, it is argued that, that material by itself, cannot be the basis to frame charge against the Applicant for offence under Section 8(c) read with Section 20 and 29 of the N.D.P.S. Act, because, at best, the same would only indicate the fact that the information was so

received, but it is not material to establish the truthfulness of the information so received.

8. On the above arguments, Counsel for the Applicant submits that the Court below has completely misdirected itself in rejecting the Application for discharge preferred by the Applicant. To buttress the above submission, reliance is placed on the decision of the Apex Court in the case of **Suresh Budharmal Kalani Alias Pappu Kalani vs. State of Maharashtra reported in 1998 SCC (Cri.) 1625**.

9. On the other hand, learned A.P.P. contends that each of the three circumstances referred to above, can be independently proved and individually sufficient to frame the charge in respect of the alleged offence against the Applicant. He has supported the reasons recorded by the lower Court in rejecting the discharge application and adopted the same as his arguments.

10. Having considered the rival submissions, I

have no hesitation in taking the view that there is no legal evidence to proceed against the Applicant, so as to frame charge in respect of the alleged offence against the Applicant. I find substance in the argument that so far as the statement of the co-accused is concerned, that is inadmissible in view of Section 25 read with Section 26 of the Act. Section 25 of the Act provides that no confession made to a Police Officer, shall be proved as against a person accused of any offence. The statement of co-accused which is pressed into service, has been made before a Police Officer. It is also rightly submitted that Section 26 of the Act will also come in the way of the prosecution to rely upon the statement of the co-accused, as that evidence is inadmissible in law. Section 26 of the Act provides that no confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

11. In the present case, it is common ground that after the statement of the co-accused was recorded by the Police Officer, the co-accused was

not produced before the Magistrate for recording of the said statement as required by Section 26 of the Act. Similarly, no statement under Section 67 of the N.D.P.S. Act has been recorded, which can be used against the Applicant.

12. Viewed in this perspective, the statement of the co-accused, which is the principal evidence against the Applicant, cannot be looked into, being inadmissible in law. There is also substance in the argument of the Applicant that the said statement being inadmissible, cannot be proved in evidence and for which reason, the same will be of no avail in view of the purport of Section 30 of the Act. Inasmuch as only proved confessions can be used in evidence, whereas, the statement of the co-accused, for the reasons recorded earlier, cannot be proved in evidence being inadmissible. Reliance has been rightly placed on the decision of the Apex Court in **Suresh Kalani's case (supra)** to buttress the above position.

13. Insofar as the third circumstance of co-accused leading the investigating team to the

house of the Applicant, the same will be of no avail because that does not take the matter any further, as no incriminating material has been recovered during the raid conducted in the house of the Applicant. In other words, no charge can be framed against the Applicant in respect of the alleged offence on the basis of that circumstance. Same is the situation with regard to the first circumstance of the fact that the Applicant's name has been disclosed in the information received by the Police under Section 42 of the N.D.P.S. Act prior to raid. Inasmuch as, the said material is only indicative of the fact that information was received about the possibility of involvement of the Applicant. But however, as there is no material to prove the factum of actual involvement of the Applicant in the commission of the alleged offence, no charge can be framed against the Applicant on the basis of such evidence. Accordingly, this Application ought to succeed.

14. Therefore, the impugned order passed by the Trial Court dated 3rd May 2003 is set-aside and instead, the Misc. Application No.42 of 2003 filed

by the Applicant for discharge is allowed.

15. Application disposed of accordingly.

A.M.KHANWILKAR, J.